in 2000, the NVVA petitioned the California Legislature to, in effect, overrule one aspect of the federal regulations – the 1986 provision authorizing wineries to use "grandfathered" geographic brands with wines made from grapes grown in a variety of regions. *See* 27 C.F.R. §4.39(i)(2)(ii).[5]

This grandfather provision had operated without controversy since its promulgation. In 1999, however, the Bronco Wine Company ("Bronco") purchased the grandfathered "Napa Ridge" wine brand, which had for many years been produced by an NVVA member, Beringer Wine Estates, with grapes grown outside Napa County. The purchase of the brand by Bronco (not an NVVA member) prompted the NVVA to draft state legislation that purported to "close a loophole" in federal law by banning the use of grandfathered brands that referred to Napa County or federally recognized "viticultural areas" within Napa County unless the wine qualified for the Napa County appellation of origin.

The NVVA claimed that such legislation was urgently required to protect consumers from deceptive labeling practices, although virtually identical labels had been used in commerce for more than fifteen years by an NVVA member without causing any apparent consumer confusion. The Legislature enacted the NVVA's legislation with only minor changes, and the Governor signed it into law. *See* CAL. BUS. & PROF. CODE §25241.

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[5] A wine brand is said to be "grandfathered" if it was contained on a COLA issued before July 7, 1986, the date the current federal regulation governing the use of brand names of viticultural significance was published as a final rule. Section 4.39(i) limits the appellations of origin with which a grandfathered brand may be used and, together with other provisions, requires that the appellation of origin appear clearly and conspicuously on the label.

Section 25241 purports to override the federal grandfather provision and to negate federally-issued COLAs. The California Legislature enacted this law based on its "finding" that Bronco's labels deceived consumers, even though those same labels, which contain conspicuous appellations of origin and other disclosures, have been found *not* to be misleading by expert federal regulators and even though similar labels had been used by Beringer for many years without incident or objection. Moreover, Section 25241 does not treat purportedly misleading brands equally. Instead, it allows NVVA members to continue using labels bearing brand names referring to AVAs within Napa County (such as Oakville, Rutherford, and Stags Leap District) on wines that do not meet the appellation requirements for these areas, as long as the wines qualify for the much broader Napa County appellation. Surely if Bronco's "Rutherford Vintners" label is misleading when used with wines from outside the Rutherford AVA, then a "Stag's Leap Wine Cellars" label is equally misleading when used with wines from outside the Stag's Leap District AVA.

Bronco argues that Section 25241 is preempted under established Supremacy Clause precedents: a State cannot prohibit what the federal government specifically authorizes, by regulation or by express license. Bronco also argues that the Court of Appeal incorrectly defined its established geographic brands are being "inherently misleading" and therefore denied them the commercial speech protections of the First Amendment. This amici brief makes three complementary points. *First*, Section 25241 undermines the strong federal interest in uniform wine labeling regulations. Wine labeling traditionally has been regulated almost exclusively by the TTB, with the States playing a decidedly subordinate role. To fulfill this central regulatory role, TTB has promulgated comprehensive, uniform national wine

labeling rules and reviewed and approved tens of thousands of proposed wine labels. State legislation that creates special labeling rules for single counties undermines the uniform federal labeling scheme, improperly destroys valuable federally-issued COLAs, and risks introducing greater complexity and confusion into wine labeling.

Second, Section 25241 impairs the strong federal interest in preserving established brand names and trademarks. While the California Supreme Court and the Court of Appeal portray the grandfather clause as an anomaly (*see*, *e.g.*, Petitioner's Appendix ("Pet. App.") A, 49a-57a; Pet. App. B, 89a-90a), it in fact reflects TTB's consistent policy of protecting well-established, approved labels when regulating geographic terminology. The same policy underlies the approach taken by both federal regulators and Congress in addressing "geographically misdescriptive" marks under federal trademark law. Federal policy in each of these areas has recognized that established brands enjoy recognition in the marketplace that new brands do not – and that rules appropriate to new brands and marks should not be applied retroactively to established ones unless a less onerous alternative would be ineffective. Section 25241 contravenes this policy: it nullifies established brands despite TTB's conclusion that such destruction is unnecessary to protect consumers.[6]

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[6] A partial list of brands owned by Amici and other wineries that are vulnerable to special interest legislation like Section 25241 includes: Amwell Valley Vineyard, Bargetto Winery, Bartlett Maine Estate Winery, Brookmere Winery, Cayuga Ridge Estate Winery, Chateau Grand Traverse, Chateau Julien Wine Estate, Chicama Vineyards, Cimarron Cellars, Coulson Winery, Dreyer Sonoma Winery, Fenn Valley Vineyards, Four Chimneys Farm Winery, Glenora Wine Cellars, Habersham Vintners, Hill Crest Vineyard, Hoodsport Winery, Kenwood Vineyards, Korbel Champagne Cellars, La Buena Vida Vineyards, Lake Sonoma

(Continued on following page)

Third, the Court of Appeal failed to consider decisions of this Court distinguishing between "inherently" and "potentially" misleading speech, and also ignored fundamental trademark principles and contrary findings by federal labeling regulators, to the net effect that established geographic brands will be improperly denied the First Amendment protections rightfully afforded to commercial speech.

ARGUMENT

I. SECTION 25241 IMPAIRS THE LONG-STANDING NATIONAL POLICY FAVORING UNIFORM AND CONSISTENT FEDERAL WINE LABELING REGULATIONS.

American wines from every region are sold to consumers throughout the country pursuant to the "national rules" established by TTB "governing the distribution, production, and importation of alcohol." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995). This system of *national* rules is vital to the continued success and growth of the U.S. wine industry. American wineries rely on the system, and spend substantial sums promoting approved wine brands and building consumer recognition and goodwill. *See, e.g., Cabo Distrib. Co., Inc. v. Brady*, 821 F. Supp. 601, 609 (N.D. Cal. 1992).

Winery, Latah Creek Winery, Leelanau Wine Cellars, McDowell Valley Vineyards, Mill Creek Vineyards, Mount Bethel Winery, Mount Palomar Winery, North Salem Vineyard, Perdido Vineyards, Santa Cruz Mountain Vineyard, Santa Fe Vineyards, Saucelito Canyon Vineyard, Shenandoah Vineyards (VA), Sierra Vista Vineyards & Winery, Sonoita Vineyards, Sonoma Creek Winery, Tennessee Valley Wine Corp., Val Verde Winery, Valley of the Moon Winery, Wiederkehr Wine Cellars, Williamsburg Winery, and Windemere Winery.

TTB's regulations promote uniformity in regulation by affording identical protections to each and every American viticultural area and by imposing identical restrictions on the use of geographic brand names. This approach ensures fair competition between and among wines from different regions: wines succeed or fail based on attributes like taste, quality, and value, and not because the law favors wines from a particular growing region.[7] The uniform federal approach also benefits consumers because, in the absence of such national labeling rules, consumers would be confronted with a multiplying array of state and local wine labeling schemes that would impose additional unnecessary costs on wineries, raise consumer prices, and invariably create consumer confusion.

The centralized COLA process also helps to promote national uniformity in wine labeling by ensuring that proposed labels are consistently reviewed by expert Labeling Specialists. American wineries rely on the COLA system. *See, e.g., Cabo Distrib. Co.*, 821 F. Supp. at 609. Indeed, in part because wineries rely so heavily on COLAs, the courts have held that COLAs, like other licenses, create important property interests that cannot be taken away without due process. *See id.*

The NVVA has acknowledged the need for uniform federal regulation of wine labels. When the NVVA in 1976 urged the TTB to retain responsibility for establishing appellations of origin, it contended that centralized federal oversight of the appellation process was necessary to

[7] The uniform approach taken by the federal rules has helped to spur a tremendous expansion in the domestic wine industry. There were over 3,700 wineries in the U.S. in 2004 and every state now hosts at least one commercial winery. *See* www.wineamerica.org (listing wineries).

ensure "uniform[ity] for all states so that all rights and interests are treated equally." NVVA President Jack Davies, "Position of the Napa Valley Vintners" (Feb. 8, 1977).[8]

The NVVA also was concerned that states would enact conflicting laws, "thereby adding ambiguity in the eyes of the consumer and possibly unfair advantages to certain growers or wineries." *Id.* A year later, the NVVA sounded the same theme, contending in a public statement that "*wine labels should be uniform in their regulation from one wine growing region of the United States to another.*" *Id.* (emphasis added).

Section 25241 accords Napa County wines special status and unique protections purportedly because consumers hold Napa County wines in uniquely high regard. *See* CAL. BUS. & PROF. CODE §25241(a). But, with due respect to Napa County, there are countless premium wine growing regions across the country that produce high-quality, award winning wines that are prized by consumers and critics alike. Wines from the Sonoma Valley, Monterey, and Mendocino AVAs in California all command premium prices, as do wines from the Willamette Valley in Oregon, the Yakima Valley in Washington, and other premium wine growing regions throughout the country. The same rationale that the Department and the NVVA have invoked to justify Section 25241 could as easily justify special labeling rules for wines made in any other appellation areas. This potentiality is not speculative, because every major appellation of origin in California, among other states, is well-represented by successful and popular brands grandfathered under 27 C.F.R. §4.39(i)(2)(ii).

[8] Amici MJN at Exh. C.

For this reason, a ruling permitting Section 25241 to stand will inevitably destroy the uniform wine labeling regulations that now exist as a matter of federal law. As the NVVA recognized a quarter of a century ago, allowing the states to enact wine labeling rules that conflict with federal regulations will create consumer confusion and increase barriers to interstate commerce in wine. This will result in a labyrinth of inconsistent wine labeling requirements that will damage the domestic wine industry and "mushroom into labeling chaos for the wine consumer." Robert Benson, *Regulation of American Wine Labeling: In Vino Veritas?*, 11 U. C. DAVIS L. REV. 115, 154 (1978). "The better solution, in a nation where every region's wines are purchased by consumers throughout the country, is to encourage a strong federal system of wine labeling rules." *Id.* Even some of those who support the Napa-centric California law concede that federal labeling regulations are the appropriate means of addressing purported consumer confusion. *See* Michael Maher, Comment, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CAL. L. REV. 1881, 1924 (2001) (concluding that "[t]o ensure consistency in wine labeling and to minimize consumer confusion and dilution of regional place names, regulatory reform is needed at the federal level.")

Unlike the state or local government legislators, TTB can balance the interests of consumers and the wine industry on a national scale, without placing undue weight on the views of a well-financed and politically connected trade association of local producers. Moreover, the TTB regulatory process gives every winery and grape grower an equal voice and an equal opportunity to make its case for regulatory change. That process also ensures that regulatory change will come, if at all, only upon the conclusion of a formal federal rulemaking by expert regulators, and not

as the result of *ad hoc* state or local legislative initiatives. In short, the forum in which to debate a Napa-only exception to the grandfather provision is the federal rulemaking process, not a state legislature.[9]

II. SECTION 25241 IMPAIRS THE CONSISTENT FEDERAL POLICY PERMITTING THE CONTINUED USE OF ESTABLISHED BRANDS.

A. The Importance Of Established Wine Brands.

As Amici know well from their own extensive experience, wine brands play an important role in the distribution of wine, and wineries invest heavily to promote their brands. Because established brands are valuable business assets, federal policies favor their preservation and protection. Section 25241 frustrates these policies by effectively destroying established brands without adequate justification.

American wines have long been sold under brand names; in fact, under the regulations, wine labels *must* include a brand name. *See* 27 C.F.R. §4.32. TTB has recognized that brands thus play a "significant" role in the marketing of wines. 64 FED. REG. 2,122, 2,125 (Jan. 13, 1999). Wine brands also play a central role in consumer purchasing decisions. Indeed, particularly in the market for "value" wines – those costing $14 or less – a familiar brand name is the single most important factor consumers consider

[9] The federal regulatory process ensures broad participation in formulating wine labeling rules. TTB's proposed rulemakings are published in the *Federal Register*; affected parties, including the entire wine industry and consumers alike, have an opportunity to submit comments and to influence the regulatory process; and final rules can be challenged as arbitrary or capricious in court by any affected persons. *See, e.g.*, *Wawszkiewicz v. Dept. of the Treasury*, 480 F. Supp. 739, 741 (D.D.C. 1979) (consumer challenge to TTB wine labeling regulations).

when purchasing wine. Simply put, consumers buy wine brands that they know and like. Wineries therefore expend substantial time, energy, and money familiarizing consumers with their brands and attempting to establish brand loyalty. *Cf. Pete's Brewing Co. v. Whitehead,* 19 F.Supp.2d 1004, 1012-13 (W.D. Mo. 1998) (discussing the importance of brand names in the beer industry); *Cabo Distrib. Co.*, 821 F. Supp. at 609 (discussing development and importance of brand names in liquor industry).

For these reasons, established brand names are "very valuable" business assets, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 286 (1988), which have long been protected by federal and state trademark law. *See* 15 U.S.C. §1051 *et seq.*; CAL. BUS. & PROF. CODE §14200 *et seq.* The law has long recognized that established brand and trade names should not be destroyed "if less drastic means [would] accomplish the same result." *Siegel Co. v. Fed. Trade Comm'n,* 327 U.S. 608, 612 (1946) (*quoting Fed. Trade Comm'n v. Royal Milling Co.*, 288 U.S. 335, 337 (1933)).

The federal grandfather clause reflects these established policies. TTB, in its 1986 rulemaking, specifically declined to adopt a restrictive geographic brand name rule with respect to established brands because it concluded that less drastic measures – namely, an appellation of origin requirement – would suffice to protect consumers. *See* 51 FED. REG. 20,482.

This conclusion had ample support in the rule-making record. For example, NVVA member Spring Mountain Winery argued that TTB should not restrict the use of the "Spring Mountain" brand (even though it is typically not used with wines made from grapes grown in the "Spring Mountain AVA") because the winery had "a proprietary right to the name" and the wine's label featured an appellation of

origin that sufficed to dispel any potential for consumer confusion. *See* Bronco Appendix (Cal. Supreme Ct.) at 400-01 ("Bronco App."). Another NVVA member, Monticello Vineyards, explained that consumers would not be confused by the continued use of its geographically misdescriptive brand name because it had "established a high-quality, well-known label under [the] 'Monticello Cellars' name" and had "developed a following for [its] wines and labels." Bronco App. at 403. Given the brand's established reputation, Monticello Vineyards argued that consumers would not be confused about the origin of its wines, particularly since the label included an appellation of origin. *See id.* In contrast to the balance struck by TTB when it adopted 27 C.F.R. §4.39(i)(2)(ii), Section 25241 disregards the importance of established brands by ignoring less drastic consumer protection measures, such as enhanced appellation disclosures or similar measures, that would adequately protect consumers, and instead adopts requirements that will unnecessarily destroy established national wine brands.

B. Section 4.39(i) Is Consistent With TTB's General Approach To Geographic Terminology.

The federal grandfather clause reflects TTB's consistent approach to the regulation of geographic terms on wine labels. For example, 27 C.F.R. §4.39(j) permits the use of "product names of geographic significance," provided the appropriate TTB officer finds that, because of their long usage, such names are recognized by consumers as fanciful product names and not representations as to origin. Similarly, TTB allows use of certain varietal designations containing geographic terms (like "French Colombard") because of their longstanding use to designate

the grape, rather than the region of origin of the wine. *See* 61 FED. REG. 522, 527 (Jan. 8, 1996).

In these instances, *as with grandfathered geographic brand names*, TTB permits use of the geographic term but requires a true appellation of origin to appear on the label. Thus, many wineries, including members of the NVVA, routinely use such geographic designations for wines that do not originate in the place named, without occasioning any claims of consumer deception.

The treatment of "semi-generic" geographic designations (*e.g.*, Champagne, Chablis, and Burgundy) further illustrates the consistency of the federal approach. The TTB has permitted the use of semi-generics on wines not originating in the named place because their geographic meaning is deemed not to be primary. *Id.* §4.24. At present, those semi-generics can be used on U.S. wine labels, provided they are accompanied by an appellation of origin. *Id.* Beginning in 2006, pursuant to a new agreement between the U.S. and the European Community ("US/EC Agreement"), sixteen of the most contested semi-generic geographic names will no longer be permitted on wine labels emanating from outside the specified geographic region.[10] US/EC Agreement, Title III, Art. 6. However, the prohibition will apply only to new uses of the semi-generic geographic names. U.S. producers using

[10] The Agreement Between the United States of America and the European Community on Trade in Wine ("US/EC Agreement") was agreed to in principle by the European Commission and the United States in September 2005 and is slated to take effect in 2006. The semi-generics affected are Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay. US/EC Agreement, Annex II. A copy of the current draft version of the US/EC Agreement can be found at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0547en01.pdf

the terms on federally approved wine labels *before* the effective date of the US/EC Agreement will be allowed to continue using them under a grandfather clause. *Id.* ¶ 2.[11]

The use of "grandfathering," or a substantial "sunset" period (which has the same effect, at least for a while) is a common approach by TTB in introducing a change in labeling regulations based on a perceived potential for consumer confusion. For example, in adopting the rule regarding geographic product names, TTB not only allowed for continued use of established names having secondary meaning, but also provided for a five-year phase-in period for the rule. 27 C.F.R. §4.39(j); *see* 43 FED. REG. 37,671, 37,675 (Aug. 23, 1978); *see also* 27 C.F.R. §§4.35, 4.35a (including phase-in periods for requirements regarding name and address of bottler or importer); *id.* §4.28(e) (including ten-year phase-in period for rule prohibiting use of the misdescriptive term "Gamay Beaujolais"); 62 FED. REG. 16479, 16483-84 (Apr. 7, 1997). Indeed, the recognition of the Napa Valley AVA itself involved grandfathering producers whose wines were made from grapes grown outside the Napa River watershed but who had misdescriptively used the "Napa Valley" designation

[11] In the protracted negotiations leading to the US/EC Agreement, the U.S. government has consistently resisted the European Community's efforts to protect its geographical indications for wine and spirits, to the extent that such protection would come at the expense of long-standing U.S. trademarks. Section 25241 stands for precisely the opposite proposition – that established geographic brand names can be eviscerated in the name of protecting the Napa Valley as a geographic source. On that basis, Section 25241 violates the Supremacy Clause. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 & 381 (2000) (invalidating Massachusetts law that interfered with the federal government's ability to "speak for the Nation with one voice in dealing with other governments" and left the executive branch with "less to offer and less economic and diplomatic leverage as a consequence").

on their labels for some time. *See* 46 FED. REG. 9,061, 9,062 (Jan. 28, 1981). The federal grandfather provision is thus consistent with TTB's policy of protecting, when possible, established labeling terms that have become accepted in the marketplace.

C. Section 4.39(i) Also Comports With Congressional Policy Regarding Geographic Trademarks.

The grandfathering provision not only comports with TTB's general regulatory approach, but it also is consistent with the approach taken by federal trade negotiators and Congress in addressing the identical issues under federal trademark law. Traditionally, federal trademark law recognized that a geographically "misdescriptive" mark was not inherently misleading. Thus, a mark that was "primarily geographically deceptively misdescriptive" of the goods could nevertheless be registered as a federal trademark if the mark "ha[d] become distinctive of the applicant's goods in commerce," that is, it possessed "secondary meaning." *See* 15 U.S.C. §1052(e)(2), (f) (1992); 1 J. Thomas McCarthy, *McCarthy on Trademarks* §5.10. Such marks could be registered for the same reason that TTB permits the continued use of established geographic brands under Section 4.39(i) – namely, because consumers come to associate such marks with the producer of the goods, not the geographic reference in the mark. *See* 2 McCarthy §14.30. "With the acquisition of secondary meaning, the geographic term takes on a new meaning denoting the trademark owner as source." *Id.* §14.9.[13]

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[13] At the same time, "deceptive" marks were not registerable or protectable. *See* 15 U.S.C. §1052(a) (1992); *id.* (2000). The distinction

(Continued on following page)

In recent years, the United States has negotiated and entered into several international trade treaties in which the issue of harmonizing trademark rights and geographical indications has featured prominently – specifically, the North American Free Trade Agreement ("NAFTA") and the multi-lateral agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") pursuant to the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"). In those negotiations, other nations strongly advocated for blanket rules prohibiting the use or protection of trademarks containing recognized geographical indications if the product originated somewhere other than the place indicated. The United States negotiators, representing the consensus view of U.S. industry, resisted such blanket rules, on the ground that they were unnecessary for consumer protection and could deprive brand owners of the equity in their brands. In both instances, a compromise was forged that proscribed the use and protection of *new* geographically misdescriptive marks, but ensured the right to continue to use and protect *existing* marks, even if geographically misdescriptive. *See* North American Free Trade Agreement, Article 1712(5) (1995); Agreement on Trade-Related Aspects of Intellectual Property Rights, Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs & Trade, Article 24(5) (1994).

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between merely "misdescriptive" marks (which are protectable) and "deceptive" marks (which are not) was *materiality* – that is, whether consumers cared about the geographic origin of the goods. If the geographic origin was material to consumers of the relevant goods, a misdescriptive mark was deceptive and therefore unregisterable; if the origin was not material, the same mark was registerable upon proof of secondary meaning. *See* 2 McCarthy §14.39.

Congress, in turn, amended U.S. trademark laws to conform to these international agreements. In those amendments, Congress imposed new restrictions on the use of "geographically misdescriptive" trademarks, including trademarks for wine or spirits, but *adopted grandfathering rules designed to protect established trademarks.* Thus, amendments made in 1993 to conform the Lanham Act to the requirements of the North American Free Trade Agreement changed the prior law to prohibit the registration of "primarily geographically deceptively misdescriptive" marks, but the amendments expressly permit registration of a mark "which became distinctive," *i.e.*, had achieved secondary meaning, before the effective date of the amendment. 15 U.S.C. §1052(e)(3), (f) (2000). Likewise, a subsequent amendment made pursuant to the multilateral agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") bars registration of a mark that contains "a geographical indication for wines or liquor [that] identifies a place other than the origin of the goods," but only if the mark was "first used . . . on or after" the grandfathering date of January 1, 1996. 15 U.S.C. §1052(a) (2000); 1 McCarthy §5.10; 2 McCarthy §14.40.

As this discussion shows, both general federal policy and international law favor the use of grandfathering to permit the continued existence of established geographic trademarks, in part because such established marks have developed secondary meanings and thus are not likely to deceive consumers and in part because recognized brands cannot readily recover lost brand equity when an intervening change in law renders that brand effectively unusable. Section 25241, in distinct contrast, destroys established brands and makes no allowance whatsoever for their secondary meaning. Section 25241 thus frustrates federal policy by disregarding established principles of trademark

law, and by effectively destroying brands that are not deceptive to consumers.

III. THE COURT OF APPEAL'S ERRONEOUS HOLDING THAT ESTABLISHED GEOGRAPHIC BRAND NAMES ARE INHERENTLY MISLEADING MAY UNFAIRLY DESTROY AMICI'S BRAND NAMES.

The Court of Appeal failed to properly consider this Court's decisions distinguishing between "inherently" and "potentially" misleading speech. *See* Petitioner's Petition for Writ of Certiorari ("Pet. Brief"), 23-24. As a result, it ruled that any geographic brand name "more likely to deceive the public than to inform it . . . is inherently misleading and its use may be prohibited." Pet. App. A., 83a. In order to reach its fallacious conclusion that established geographic brand names are inherently misleading, the Court of Appeal necessarily ignored findings of this Court post-dating the *Central Hudson* case,[13] disregarded contrary findings by the TTB, and abandoned the entire concept of "secondary meaning," which is a basic tenet of trademark law, *see* 15 U.S.C. §§1052(e)(2)-(3), (f) (1992).

Many of the Amici own well-established geographic brands which have long been used legally and without consumer complaint. Amici's brands, like those of Petitioner, convey not a geographic source but rather a particular quality and reputation associated with the producer (*i.e.*, they have developed "secondary meaning"). Moreover, Amici's wine labels communicate accurate and non-misleading information about the source of the wine,

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[13] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *see* Pet. Brief, 23-24.

as they are required to under federal law. *See* 27 C.F.R. §4.39(i)(2)(iii). Therefore the "inherently misleading" designation as applied by th Court of Appeal is both legally and factually incorrect.

The Court of Appeal's decision would permit state legislatures to ban Amici's brands merely by passing legislation similar to Section 25241. Further, the Court of Appeal's holding puts Amici at risk by providing grounds for an argument that Amici's brands constitute unfair competition. Competitors could seek to destroy the equity built up in established geographic brand names on the ostensible ground that Amici's labels are unfair because they are "inherently misleading." The far-reaching negative repercussions of this erroneous holding are quite troubling to Amici.

CONCLUSION

Amici urge the Court to accept Petitioners' Petition for Certiorari and reverse the decisions below. The special interest statute that is at the heart of this case is fundamentally inconsistent with the regulatory foundation upon which the United States wine industry is built and the statute should not be permitted to stand.

DATED: December 22, 2005

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(1)

No. 05-653

IN THE

Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER CIRCLE, INC.,
Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY VINTNERS ASSOCIATION,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

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Pursuant to Rule 15.8 of the Rules of this Court, Petitioners file this Supplemental Brief to bring to the Court's attention an "intervening matter not available at the time of the party's last filing."

One of the principal issues presented by the Petition is the applicability and scope of the exception to the "presumption against preemption" recognized in *United States v. Locke*, 529 U.S. 89 (2000). *See* Pet. 21-23; Pet. Rep. Br. 7-8. Since the filing of the reply brief in support of the Petition, Petitioners have learned that the very same issue is before the Court in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371, which is set for oral argument on January 18. There, as here, the Respondents argue that, despite a history of federal regulation dating back (at least) to the 1930's, the presumption against preemption applies because state regulation supposedly pre-dates federal involvement. *Compare* Brief for Respondents, No. 04-1371, at 30, *with* NVVA Opp. 24. Indeed, the Respondents in *Dabit* rely on the very same passage from *Locke* that the California Supreme Court cited in holding that the presumption against preemption is only dispelled if federal regulation has been "manifest since the beginning of our Republic." *Compare* Brief for Respondents, No. 04-1371, at 29, *with* Pet. App. 37a. n.42 (both citing *Locke*, 529 U.S. at 99).

Accordingly, although Petitioners continue to believe that their petition should be granted for all the reasons set forth in the petition and reply, the Court should at the very least hold the petition pending the decision in *Dabit* and then remand the case to the California Supreme Court in light of that decision.

DATED: January 17, 2006.

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